



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/24/0814

Re: Property at Flat 4, 4 Avon Street, Hamilton, ML3 7HU (“the Property”)

Parties:

Ms Farhana Ghani, 15 Fleurs Avenue, Glasgow, G41 5AR (“the Applicant”)

Mr Ighedeosa Febian and Ms Josephine Febian, Flat 4, 4 Avon Street, Hamilton, ML3 7HU (“the Respondents”)

Tribunal Members:

Shirley Evans (Legal Member) and Gordon Laurie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application be dismissed.

Background

1. This is an action for recovery of possession of the Property. It was raised in terms of Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”).
2. The application was accompanied by an AT5 dated 25 November 2017 by the Applicant’s sister Farzana Ghani, a signed but undated Declaration of acknowledgement of the AT5, a signed Tenancy Agreement between Farzana Ghani and the Respondents dated 10 December 2017, a prior notification of Grounds relating to Recovery of Possession (Housing (Scotland) Act 1988) dated 10 December 2017, various photographs, an electrical condition inspection report dated 18 March 2020, Notices to Quit, an AT6s and Notices under S 33 of the Housing (Scotland) Act 1988 addressed to each of the Respondents all dated 15 September 2023, Recorded Delivery Proofs of Postage dated 10 November 2023 and a Notice under Section 11 of the

Homelessness etc.(Scotland) Act 2003 addressed to South Lanarkshire Council.

3. On 20 February 2024 the Tribunal emailed the Applicant's solicitor requesting a copy of the Notice to Leave and proof of postage. The Applicant's solicitor replied on 20 February 2024 stating that no Notice to Leave was required as the tenancy was a Short Assured Tenancy.
4. On 15 March 2024 the Tribunal accepted the application under Rule 9 of the Regulations.
5. On 24 July 2024 the Tribunal enclosed a copy of the application and invited the Respondent to make written representations to the application by 14 August 2024. The Tribunal advised parties that a Case Management Discussion ("CMD") under Rule 17 of the Regulations would proceed on 26 August 2024. This paperwork was served on the Respondents by Stuart Sinclair, Sheriff Officer, Glasgow on 25 July 2024 and the Executions of Service were received by the Tribunal administration.
6. On 2 August 2024 Mr Fabien emailed the Tribunal to advise he was not opposed to the application but asked for a couple of months to find alternative accommodation.

Case Management Discussion

7. The Tribunal proceeded with a CMD on 26 August 2024 by way of teleconference. Ms Hogg from Stodarts, solicitors appeared for the Applicant. The Applicant's sister Farzana Ghani and her father Mr Abdul Ghani were in attendance. Initially there was no appearance by the Respondents despite the CMD starting 10 minutes late to allow them plenty of time to join the call. The case was heard together with a case for arrears under case reference number FTS/HPC/CV/24/1308.
8. The Tribunal had before it the AT5 dated 25 November 2017 by the Applicant's sister Farzana Ghani, the signed but undated Declaration of acknowledgement of the AT5, the signed Tenancy Agreement between Farzana Ghani and the Respondents dated 10 December 2017, the prior notification of Grounds relating to Recovery of Possession (Housing (Scotland) Act 1988) dated 10 December 2017, various photographs, the electrical condition inspection report dated 18 March 2020, Notices to Quit, an AT6s and Notices under S 33 of the Housing (Scotland) Act 1988 addressed to each of the Respondents all dated 15 September 2023, Recorded Delivery Proofs of Postage dated 10 November 2023, the Notice

under Section 11 of the Homelessness etc.(Scotland) Act 2003 addressed to South Lanarkshire Council and Mr Fabien's email of 2 August 2024. The Tribunal considered these documents.

9. Ms Hogg moved the Tribunal to grant an Order for Eviction. She explained the Applicant's sister had been the original landlord of the Property which had now been taken over by the Applicant. When the Notices to Quit, S33 Notices and AT6 had been served there were hardly any arrears and she had understood the Applicant wanted to move back into the Property. However as these notices were served some time ago, matters have moved on. She submitted the Applicant was now not intending to move into the Property. The Respondents had not paid any rent since the notices were served and the Respondents were now in arrears of £6125. They had served a pre action letter on 20 October 2023. The Respondents had not made any proposals to pay the arrears. There were issues with the condition of the Property which was cluttered. Mould had started to develop and there were issues with tradesman getting access. There had also been a physical altercation between one of the Respondents and a neighbour.
10. The Tribunal questioned Ms Hogg as to whether the tenancy agreement was a Short Assured Tenancy or a Private Residential Tenancy with reference to the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017 ("the 2017 Regulations"). Ms Hogg submitted that the AT5 was dated 25 November 2017. The intention of the parties was to create a Short Assured Tenancy. However the Respondents could not move in straight away. The Tribunal pointed out that in terms of the Clause 3 the tenancy commenced on 10 December 2017 and that regardless of the intention, the legislation was clear that any tenancy that commenced after 1 December 2017 was a Private Residential Tenancy. Ms Hogg submitted she was relying on paragraph 6 (a) of the 2017 Regulations and that the tenancy was a Short Assured Tenancy.
11. The Tribunal adjourned to consider Ms Hogg's submissions. After the adjournment the Respondents had joined the CMD.

Findings in Fact

12. The Applicant's sister Farzana Ghani signed an AT5 on 25 November 2017. The Respondents signed a tenancy agreement headed "Short Assured Tenancy" on 10 December 2017. The tenancy agreement was not signed by the Applicant's sister.

13. In terms of Clause 3 of the tenancy agreement the tenancy commenced on 10 December 2017.
14. The Landlord's interest in the tenancy agreement has been assigned in favour of the Applicant.
15. On 15 September 2023 the Applicant's solicitor served separate Notices to Quit, S33 Notices and AT6s on each of the Respondents.
16. On 5 September 2023 the Applicant's solicitor served a S11 Notice in terms of the Homelessness etc (Scotland) Act 2003 on South Lanarkshire Council

Findings in Fact and in Law

17. The tenancy between the Applicant and the Respondents is a Private Residential Tenancy in terms of Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016.
18. The Applicant has not served Notices to Leave in terms of Section 62 of the Private Housing (Tenancies) (Scotland) Act 2016.

Reasons for Decision

19. The Tribunal considered the documents before it and the submissions from Ms Hogg. The Tribunal was of the opinion that despite the Applicant's sister having the intention that she was entering into a Short Assured Tenancy as a matter of law the tenancy could not be a Short Assured Tenancy.
20. Whilst the 2017 Regulations set out savings conditions paragraph 6 (a) of the 2017 Regulations does not assist the Applicant. Paragraph 6 (a) provides that:-

“Despite the amendments made by section 75 and paragraphs 1, 2 and 3 of schedule 5 of the 2016 Act, sections 12, 32(7) and 33(8) of the 1988 Act have effect on and after 1st December 2017 as they had effect immediately before that date but only in relation to—

(a) a short assured tenancy (within the meaning given in section 32(1) of the 1988 Act) which was created before 1st December 2017 and continues in existence on that date;”

Whilst Ms Hogg referred to the fact that the AT5 was dated 25 November 2017 the tenancy itself was not in existence on 1 December 2017. In terms of

Clause 3 it did not come into existence until 10 December 2017. It was not signed until 10 December 2017. In such circumstances the tenancy cannot be said to have been created before 1 December 2017. Further a tenancy that commences on 10 December 2017 cannot be said to have been continued after 1 December 2017 as it had not even commenced.

21. It is not sufficient for the Applicant's sister to have had an intention to create a Short Assured Tenancy. She simply cannot ignore the legislation which came into force on 1 December 2017 in terms of the 2016 Act. If the tenancy had commenced before 1 December 2017 she might have created a Short Assured Tenancy. She did not do that. Parties have clearly agreed that the tenancy commenced on 10 December 2017.

22. The Applicant has not served any valid notice to bring the tenancy agreement to an end. She has not taken the necessary steps to proceed with eviction. The Tribunal is obliged to deal with proceedings justly in terms of the overriding objective under Rule 2 of the Regulations. Despite Mr Fabien stating he has no objection to the application; the Tribunal simply has no power in the circumstances without a Notice to Leave to grant an order for eviction in terms of Section 51 of the 2016 Act.

Decision

23. The Tribunal accordingly dismiss the action. The decision of the Tribunal was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Shirley Evans

26 August 2024

Legal Chair

Date

